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CONFIDENTIAL SETTLEMENT COMMUNICATION – SUBJECT TO F.R.E. 408

May 4, 2012

Michelle Kerr, Remedial Project Manager
U.S. Environmental Protection Agency—Region 5
Superfund Division (SR-6J)
77 West Jackson Blvd.
Chicago, Illinois 60604-3590

RE: CERCLA's Inapplicability to Mueller Co., LLC for the Chemetco Superfund Site in Hartford, Illinois

Dear Ms. Kerr:

This firm has been retained by Mueller Co., LLC ("Mueller") which received a General Notice Letter and Information Request for the Chemetco Superfund Site in Hartford, Illinois (the "Request") dated November 30, 2011. The Request indicated that EPA had identified Mueller as a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC §§ 9601, *et seq.* ("CERCLA") for contamination located at the Chemetco Site ("the Site"). In subsequent conference calls, EPA suggested that the PRPs outline their defenses in a letter sent contemporaneously with their responses to the Request. Accordingly, this letter details Mueller's defenses to CERCLA liability for the Site.

Mueller does not fall within any of CERCLA's four categories of "covered persons." Mueller is not a present or former owner of the Site and never acted as a transporter who accepted hazardous substances for transportation and disposal at the Site. Mueller is therefore not liable under CERCLA § 107(a)(1), (2), or (4). Further, Mueller never arranged for "disposal or treatment ... of hazardous substances" as required for liability under CERCLA § 107(a)(3). Mueller did not enter into the Chemetco transactions with the intent to dispose as required by *Burlington Northern & Santa Fe Railway v. United States*[1] and therefore is not liable as a CERCLA "arranger."[2]

[1] 556 U.S. 599, 129 S.Ct. 1870 (2009).

[2] EPA indicated in its "Waste In List," attached to the General Notice Letter as Enclosure B, that all of Mueller's materials were excluded from the definition of scrap metal under the Superfund Recycling Equity Act of 1999 ("SREA"). However, SREA makes clear that a preliminary decision must be made to establish if the person is liable under CERCLA § 107, and as fully discussed above, Mueller had no intent to dispose, and therefore was not an "arranger" under CERCLA § 107 and the scrap metal exemption is irrelevant. Even assuming Mueller satisfied

Mueller's Sales to Chemetco

As more thoroughly described in Mueller's enclosed responses, Mueller operates a brass foundry in Decatur, Illinois. The Decatur facility manufactures brass fittings for fire hydrants and other water supply systems. To manufacture the fittings, Mueller pours brass into casts resulting in approximately 50% yield per pouring. The remaining gates and sprues, along with the ladle spills and furnace skimmings are recovered to the extent possible through a sand system screening process and the recovered product is fed back into Mueller's production through the concentrator mill. Certain other spatters, furnace skimmings, and spillage from the furnaces and ladles, while no longer useful in Mueller's particular processes due to efficiency and economic considerations, were sold at fair market value to Chemetco as a useful product for their particular processes.

Mueller also has a wash process for the castings. The water used in this process is reclaimed and reused, while the copper mud, which is a mixture of copper and unrecovered water that results from this process, was sold at fair market value to Chemetco as a useful product. Copper mud was a very small portion of the total product sold to Chemetco. According to Chemetco's records provided to the PRPs by EPA, only 19,051 pounds of a total of 2,974,791 pounds sold by Mueller to Chemetco between October 2000 and October 2001 were copper mud (or approximately 0.6%).

Chemetco produced high purity copper products. Once Mueller sold the material to Chemetco, Chemetco owned the material outright. Mueller had no authority over Chemetco's business practices and processes and did not maintain any legal rights to or interest in the material post-sale. Mueller's sole involvement with Chemetco was Mueller's sale of a useful and marketable product to Chemetco. Mueller was not arranging for disposal, but instead participated in an arm's-length business arrangement for the sale of a valuable product at a competitive price.

A commercial market existed for the product sold, and Mueller had no intention of disposing of, treating, or trading this product as a waste. Chemetco paid Mueller $503,928.52 for this useful, marketable product in fiscal year 2001 alone. Further, Mueller continues to sell this same product for fair market value to secondary copper refineries like Chemetco. In comparison, when Mueller disposes of hazardous wastes, Mueller complied with and continues to comply with all applicable RCRA laws and regulations.

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the CERCLA "arranger" criteria, Mueller would qualify for the SREA scrap metal exemption. Mueller's product meets the definition of "scrap metal" provided in § 127(d)(3) because the spillage and skimmings resulting from Mueller's use of brass ingots are "bits and pieces of metal parts" and the product has not been excluded from the definition of scrap metal by any regulation promulgated by the Administrator. 42 U.S.C. § 127(d)(3). Further, Mueller meets all the criteria under CERCLA § 127(d)'s exemption for scrap metal transactions, including the legitimate recycling criteria found in subsection (c) as required by CERCLA § 127(d)(a)(A).

Definition of Arranger Post-*Burlington Northern*

Mueller's position that it is not a CERCLA arranger finds legal support in the plain language of CERCLA, the *Burlington Northern* opinion, and cases applying the *Burlington Northern* intent standard. CERCLA defines an "arranger" as "any person who by contract, agreement, or otherwise arranged for disposal or treatment or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person . . . ."[3] In its 2009 *Burlington Northern* opinion, the Supreme Court resolved a circuit split regarding the meaning of "arranged for disposal or treatment . . . of hazardous substances" which was left undefined by CERCLA and held that in order to be considered an arranger, a person must have specific intent and take "intentional steps to dispose of a hazardous substance."[4]

In *Burlington Northern*, the Supreme Court reversed the Ninth Circuit's determination that Shell Oil Company could be liable as an arranger when it sold a useful product, a hazardous chemical, if the "disposal of hazardous wastes [wa]s a foreseeable by-product of, but not the purpose of, the transaction giving rise to" arranger liability.[5] The Ninth Circuit found that Shell was aware that some product would leak upon delivery; "disposal of a hazardous substance was thus a necessary part of the sale and delivery process."[6] The Supreme Court, however, held that an entity's knowledge that some of the product would be disposed of is not sufficient to establish arranger liability, and instead, "Shell must have entered into the sale of [the chemical] with the *intention* that at least a portion of the product be disposed of during the transfer process by one or more methods described in [RCRA, 42 U.S.C.] § 6903(3)."[7] The Supreme Court recognized that there would be "many permutations of 'arrangements' that fall between" one extreme in which a party entered into the transaction for the sole purpose of disposal and the other extreme in which a party sold a new and useful product that the purchaser, unbeknownst to the seller, disposed of in a way that contaminated the purchaser's property.[8] A survey of the post-*Burlington Northern* decisions that have applied the intent requirement when determining arranger liability under CERCLA § 107 confirms that Mueller's sales to Chemetco were sales of a useful product and without the requisite intent to dispose.

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[3] 42 U.S.C. § 9607(a)(3)).

[4] *See Burlington Northern*, 556 U.S. 599, 610-11, 129 S.Ct. 1870.

[5] *Id.* at 606-07.

[6] *Id.* at 607.

[7] *Id.* at 612 (emphasis added). CERCLA defines "disposal" in 42 U.S.C. § 9601(29) by referencing its RCRA definition which states:

> The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or place of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters."

See Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6903(3).

[8] *See Burlington Northern*, 556 U.S. at 610.

In *Team Enterprises, LLC v. Western Investment Real Estate Trust*, the Ninth Circuit held that a manufacturer of PCE filtering equipment for dry cleaners lacked the requisite intent to qualify as an arranger under the "useful product" doctrine.[9] The Court emphasized that under *Burlington Northern*, "knowledge alone [that the product it sells will be disposed of] is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product."[10] "[T]o satisfy the intent requirement, a company selling a product that uses and/or generates a hazardous substance as a part of its operation may not be held liable as an arranger under CERCLA unless the plaintiff proves that the company entered into the relevant transaction with *the specific purpose* of disposing of the hazardous substance."[11] The Ninth Circuit also noted to be considered an arranger, the party must have actual control over the disposal process or the legal authority to direct the ultimate disposer's conduct, and that recommendations (like those found in an instruction manual) did not control the actions of the purchaser.[12]

Likewise, the District Court of Connecticut recently applied *Burlington Northern*'s intent requirement in granting summary judgment in favor of an alleged "arranger" and held that the sale of scrap metal did not show a purpose of disposing of hazardous material.[13] In *Schiavone*, the defendants sold transformers to purchasers at a sale price based on the market value of the metal in the transformer.[14] Under this arrangement, the court found that "[t]he agreements with purchasers of scrap metal were for the purchase of scrap metal only, and contained no reference to the disposal of PCBs or any other hazardous substance."[15] Though the defendants had knowledge that the transformers contained oil upon their sale, the defendants did not have the specific purpose or intent to dispose of any PCB-containing oil that was in the transformers as hazardous waste.[16]

In *Pneumo Abex Corporation v. High Point, Thomasville and Denton Railroad Co.*,[17] the Fourth Circuit held that a seller of worn out and broken bearings had no arranger liability because "removal of contaminants was not the purpose of the transaction...removal of dirt and grease was *incidental* to remolding...just as it would have been incidental to the molding of new [products] from virgin materials."[18] The purchaser melted down the old bearings in a process

[9] 647 F.3d 901, 906, 909 (9th Cir. 2011).

[10] *Id.* at 908 (*quoting Burlington Northern*, 556 U.S. at 612).

[11] *Id.* at 909.

[12] *Id.* at 910.

[13] *Schiavone v. Northeast Utilities*, Civil No. 3:08cv429(AWT), 2011 WL 1106228 (D. Conn. Mar. 22, 2011).

[14] *Id.* at *1.

[15] *Id.*

[16] *Id.* at *6.

[17] 142 F.3d 769 (4th Cir. 1998). Although this case pre-dates *Burlington Northern*, the Supreme Court in resolving the circuit split adopted the same intent test that the Fourth Circuit applied in *Pneumo Abex* and the Supreme Court affirmatively cited the case in its decision. *See Burlington Northern*, 556 U.S. at 610.

[18] *Id.* at 775 (emphasis added).

that produced dirt and slag which were dumped in a lot and led to contamination at the site.[19] In affirming summary judgment in favor of the defendant, the court focused on "the intent of both parties to the transaction" to reuse the material, and so the sales were "not transactions for disposal."[20] The Court also noted that the purchaser paid for the worn bearings, but the seller did not pay purchaser to dispose of unwanted metal.[21] The court determined that deductions in the sales price were based on weight of useful materials, and not to compensate the purchaser for "reclamation costs."[22] Because the purpose of the transaction was not disposal, the seller could not be held liable as an arranger under CERCLA.

Conversely, in *United States v. General Electric*, the First Circuit affirmed the district court's determination following a bench trial that GE viewed its scrap insulating material, Pyranol, as waste product, and so GE had sufficient intent to render it liable as a CERCLA arranger.[23] While the court noted that *Burlington Northern* endorsed the useful product doctrine, it distinguished the facts before it (from both *Burlington Northern* and *Team Enterprises*) because of GE's behavior and knowledge. GE knew that there was no real demand or a viable market for the Pyranol other than the one purchaser's "idiosyncratic interest," in using Pyranol as an additive to paint.[24] At one point, GE wrote off the purchaser's debt because the company knew that some drums were of such poor quality that they were of no value.[25] GE shipped Pyranol to the one purchaser at its own pace, and shipments continued even after the purchaser stopped paying.[26] The court concluded that any profit derived from the sale of scrap Pyranol was "subordinate and incidental to the immediate benefit of being rid of an overstock of unusable chemicals."[27] At times, GE sent Pyranol to local landfills, gave it to employees to use as weed killer, and discharged it into the Hudson River.[28] Based on these facts, the court held that GE's activities did not qualify as sales of useful products and therefore GE was held liable as an arranger.

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] 670 F.3d 377 (1st Cir. 2012).

[24] *Id.* at 386. The Court also noted that if Pyranol's use as a paint additive was a legitimate marketable use for Pyranol, GE would have incorporated Pyranol into its own paint making operations, or marketed and sold it to more and bigger purchasers. *Id.*

[25] *Id.* at 387.

[26] *Id.*

[27] *Id.* at 385.

[28] *Id.* at 385.

Mueller was not an arranger under CERCLA § 107(a)(3)

After considering the various factors from the relevant case law discussed above, it is clear that Mueller did not have the intent to dispose of a hazardous substance necessary to establish arranger liability under CERCLA § 107(a)(3):

1) Mueller received value for the product;

As noted above, Chemetco paid Mueller $503,928.52 for the product over the course of one year alone.[29] Chemetco was purchasing a valuable product at a competitive price, and payments were consistently received by Mueller. The price was based on the market value of the metal in the product, just as the price in *Schiavone* was based on the market value of the metal in the transformers.

2) Mueller did not alternatively dispose of the product in the absence of a purchaser;

There is no evidence that Chemetco at any time was unwilling to purchase any product sold to it by Mueller. Mueller continues to have a market for the same as-is products it sold to Chemetco. In fact, Mueller used the same materials up to a point where it was no longer economically feasible given the technology at Mueller's facility. Conversely, Chemetco had a more advanced and flexible process that could use a broad range of copper-bearing materials. These facts are distinctly different from those presented in *GE*, where GE disposed of Pyranol in a variety of ways in the absence of a legitimate market.

3) Other potential purchasers existed;

As noted above in #2, other companies utilize operations similar to Chemetco and are willing to purchase the product for fair market value of the metal through arm's-length transactions. Mueller continues to sell its product to other companies for fair market value.

4) Any contaminants were "incidental" to the use of the product and contaminants would have been "incidental" to Chemetco's use of a raw virgin material if substituted for the product; and

The as-is material sold to Chemetco contained valuable copper and while the metal product may have contained content that was not useful to Chemetco, so would a raw virgin material. Just as the smelter in *Pneumo Abex* produced wastes, Chemetco's processing would inevitably produce waste products like dirt and slag, regardless of whether Chemetco used Mueller's useful product or a raw, virgin material. *Burlington Northern* and its progress make clear that Mueller's knowledge that waste was inevitable does not alone create arranger liability.

[29] *See* Mueller's Information Request Responses at MUELLER 507.

5) Mueller did not have actual control over Chemetco's disposal process or the legal authority to direct the ultimate disposer's conduct.

Chemetco arranged for the transport of the product bought from Mueller and paid a fair market price for the product. After the sale, Mueller had no authority over Chemetco's business practices and processes and did not maintain any legal rights to or interest in the material once it was sold to Chemetco outright. Mueller's sole involvement with Chemetco was Mueller's sale of a useful and marketable product to Chemetco. Mueller was not arranging for disposal, but instead participated in an arm's-length business arrangement for the sale of a useful product.

All of these factors support a finding that Mueller was not an arranger as contemplated by CERCLA § 107(a)(3) and therefore has no liability under CERCLA for the Site.

In conclusion, Mueller is not an arranger for disposal under CERCLA § 107(a)(3) and therefore should not be subject to liability at the Site. Mueller's sole connection to the Site is its sales of an as-is useful product to Chemetco through an arm's-length transaction for fair market value.

Should you wish to discuss this letter in more detail, please do not hesitate to contact me.

Sincerely,

Lee A. DeHihns, III
Counsel for Mueller Co., LLC

LAD:ga

CC: Greg Hollod, Mueller Water Products, Inc.
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